

Caregiver's Guide to Engaging Support Workers

Bill 148 - Implications for Families

Presented by

COMMUNITY LIVING GUELPH WELLINGTON

January 17, 2018



Cheryl W. Pooran
416-860-7572

cwpooran@pooranlaw.com

1500 Don Mills Road, Suite 400, Toronto, Ontario M3B 3K4 | fax: 416-860-7577 | www.pooranlaw.com

inclusive results

Agenda

1. Employment Law 101
2. Bill 148
 - Why is this happening?
 - What does it mean?
3. Application to Families
4. Informed Choices and Best Practices for implementation
 - Option 1 - Independent Contractors
 - Option 2 - Employment Relationships
 - Option 3 - Temp Agency Workers
 - Option 4 - Novel Care Arrangements
5. When and Where to Get Help



inclusive results

2

Employment Law 101

1. Common law

- Court decisions or “precedents”
- Foundation for tests of employee vs. “self-employed” independent contractor

2. Contract

- Restricted by “common law”
- Provides opportunity to opt out of certain aspects of common law

3. Employment Standards Act, 2000 (and Bill 148)

- Minimum requirements imposed by legislature
- Restrict/limit contracts and common law but can’t “opt out” of ESA
- Applies to Employees, however, broad scope and application due to mandate
- Covers:
 - Minimum wage, public holidays, vacation, overtime, hours of work, leaves of absence etc.
 - Exemptions from certain requirements apply for live-in support workers
 - Generally applies to all employees (regardless of whether part time, full time, occasion etc.)
 - Generally applies to all employers (regardless of corporate status, number of employees, business, etc.)

WHY BILL 148

- Changing workplaces review 2015-2017
- Vulnerable workers
 - Part-time, casual, temporary, season workers
 - No job protection/perilous employment
 - Often denied employment standards rights
- Objective to create “good, full-time jobs”
- Willing to impose penalties to encourage movement away from practices that make workers vulnerable

Bill 148 - Key Changes and Dates

Amendment

- Employee Misclassification
- Critical Illness Leave
- Minimum Wage
- Method of Payment
- Temporary Help Agency Amendments
- Paid Vacation
- Public Holiday Pay
- Record Keeping
- Personal Emergency Leave
- Leaves of Absence
- Equal Pay for Equal Work (incl. THA)
- Scheduling
- Right to Request Changes

In force

- November 27, 2017
- December 3, 2017
- January 1, 2018 (\$14.00)
- January 1, 2019 (\$15.00)
- January 1, 2018
- January 1, 2018
- January 1, 2018
- January 1, 2018
- January 1, 2018
- January 1, 2018
- January 1, 2018
- April 1, 2018
- January 1, 2019
- January 1, 2019



inclusive results

New Prohibition on Mischaracterizing Workers

(Effective November 27, 2017)

- Mischaracterization of a worker who is actually an employee as a non-employee now an offence.
- Families characterizing workers as “self-employed” or “independent contractors” at risk if worker doesn’t meet the “test”
- Burden of proof on the “employer”
- Fines and penalties
- Increased focus, public awareness and scrutiny
- Sadly claims already being made by workers against families



inclusive results

Wages, Vacation, Public Holiday & Personal Emergency Leave

Law	Current (Effective Jan. 1, 2018)	Previously
Minimum Wage	\$14/hr 01/01/18 \$15/hr 01/01/19	\$11.60/hr 10/01/17
Vacation/ Vacation Pay	After 5 years* 3 weeks/6%	2 weeks/4% wages
Public Holiday Pay	Total of regular wages earned in last pay period divided by number of days worked in that period <ul style="list-style-type: none"> • Pay period is whatever you have established • If no regular wages due to PEL or vacation, then look at pay period preceding 	Pay based on total pay in previous 4 weeks divided by 20
Personal Emergency Leave	2 days paid, 8 days unpaid per employee per calendar year <ul style="list-style-type: none"> • No sick notes may be required • Pay based on lost wages • Available for: <ul style="list-style-type: none"> • illness, injury, medial emergency, of worker, or close family, or death or other urgent matter related to close family member 	10 days unpaid, only if 50 or more employees

Scheduling

(Effective Jan. 1, 2019)

3 Hour Rule

- 3 hours at regular wage when regularly scheduled for more than 3 hours but sent home after less than 3 hours;

Requesting Scheduling and Location Changes

- Right to request, discuss and written reasons
- Freedom from retaliation

Right to Refuse Shifts

- Right to refuse a shift or a request to be on-call when request is made with less than 4 days (96 hours) notice

Cancellation Pay

- Minimum 3 hours at regular rate if shift cancelled on less than 48 hours notice (except where unavailable due to factors beyond employers control)

On-call Pay

- Minimum 3 hours on-call pay for every on-call period of up to 24 hours.

Leaves of Absence

Leave	Current (Jan. 2018 or earlier)	Previously
Pregnancy leave (still-birth or miscarriage)	12 weeks	6 weeks
Parental	61-63 weeks	35-37 weeks
Family Caregiver	No change	8 weeks
Family Medical	28 weeks	8 weeks
Critical Illness	17 weeks for adults 37 weeks for children	"Critically Ill Childcare leave" - 37 weeks
Reservist	No change	No limit
Organ Donor	No change	13 weeks
Child death leave	104 weeks Death of child for any cause	"Crime related child death leave" - 104 weeks
Crime-Related Child Disappearance Leave	104 weeks	52 weeks
Sexual and Domestic Violence Leave	5 days paid, 5 unpaid days + 13 weeks unpaid Provisions related to evidence, eligibility, disclosures, & mandatory confidentiality mechanisms (recommend policy)	No separate leave available for these grounds

Other Changes with Limited Application to Families

Equal Pay for Equal Work (Effective April 1, 2018)

- Prohibition on distinctions based on status (FT v PT / casual / temp) where employees perform the same work
- Numerous permissible distinctions (seniority, quality/quantity of work, "any other reason")
- Right to review and reasons

Temporary Help Agencies (Effective Jan. 2018)

- New notice requirements (1 week)
- New information and documentation entitlements (from "client" and THA)
- New record keeping obligations (on "client" and THA)
- Equal Pay (effective Jan. 1, 2018)

Record Keeping Obligations (Effective Jan. 2018)

Simulated Work Exemption Eliminated (Effective Jan. 2019)

On-the-job training Exemption Eliminated ((Effective Jan. 2018)

Application to Families

1. How does this apply to Families?

- Families engaging workers subject to same laws as businesses and regular employers.
- If the worker is an employee as opposed to a true independent contractor

2. Why is this issue important now?

- Continuous
- Increased individualized funding
- Publicized and politicized issue
- New offence and increased enforcement

3. When does this issue come up?

- Audit
- Injury
- Claim

Making Informed Choices

1. What is the status of my worker?
2. What are the risks of mischaracterizing my worker?
3. What are my obligations to my worker based on their status?
4. How do I implement my choice to minimize the risks?
5. When, where and how do I get help?

When Are Families “Employers”?

Independent Contractor vs. Employee?

1. Intent of the parties
2. Four Factor Test
 - Control
 - Ownership of Tools
 - Risk of Loss
 - Chance of Profit
3. Other Practical Factors for Families
 - Duration
 - Dependency/Exclusivity
4. List of factors that relate specifically to families

At the end of the day, if it walks like a duck and quacks like a duck
its probably a duck!

What if We Get it Wrong?

Depends on “forum”

1. Revenue Canada
2. ESA
3. WSIB
4. Civil Liability

Now What?

Options:

1. Independent Contractor
2. Employee
3. Staffing Agency
4. Novel Models of Support

Option 1 - Independent Contractor

Status Implications for Caregivers

- No Income Tax, CPP, or EI deductions or reporting obligations
- Independent contractor required to be reporting their earnings
- No restrictions or obligations as to Paid Holidays, Vacations, Hours of Work, Overtime etc.
- No employment law reasonable notice of termination requirements (but beware the dependent contractor)
- No WSIB
- No OHSA
- No Human Rights

Option 1 - Independent Contractor

Recommendations for Caregivers

- Screen background and get references
- Ensure agreement properly reflects the relationship
- Include insurance requirements (especially around driving) and consider requiring WSIB Independent Operators Insurance
- Include expectations and obligations for worker to deduct/remit and report earnings
- Address termination
- If your relationship changes over time (ex. hours increase/worker takes on more characteristics of an employee) change your arrangement
- Require invoices (contractor can receive advantageous tax status)
- Keep records

Option 2 -Employment Relationships

Status Implications for Caregivers

- Must ensure valid SIN
- Must deduct and remit Income Tax, CPP, EI, file T1, T4, T4A and provide ROEs on termination
- Must comply with ESA
 - Provide ESA poster
 - Provide Paid Holidays, Vacations, comply with hours of work and overtime requirements (plus new obligations under Bill 148) subject to exemptions for certain workers
 - Record Keeping
- Must provide notice of termination (statutory and common law in the absence of a contractual restriction)
- Purchase WSIB (unless exempt)
- Meet OHS requirements (mandatory training, workplace harassment and violence policies and training)
- Meet Human Rights requirements (note exemptions for caregivers)

Option 2 -Employment Relationships

Recommendations for Caregivers

- Written agreement to limit liability on termination and clearly communicate expectations
- Know your obligations under the ESA
- Avoid reprisals
- Register with WSIB if appropriate (or obtain alternative insurance/ensure adequate vehicle insurance)
- Register for a business payroll number
- Deduct, remit, report (consider Ceridian and ADP, and smaller support orgs, many small family run organizations helping other families for this type of work)
- Keep records

Option 3 - Agency Workers

Status Implications:

- Temporary help agencies legislation
- Responsibilities as a client
- Exposure

Recommendations:

- Reputable agency
- Ensure agency treats workers as employees
- Require WSIB
- Appropriate agreement with warranties/indemnity for non-compliance
- Keep records (hours per day, days per week)
- Notice requirements
- Equal pay requirements
- Insurance

Option 4 –Novel Care Relationships

Examples

- Homesharing
- Microboards

Recommendations

- Homeshare
 - Careful paying fees to homesharer
 - Careful when mixing roles
- Microboards
 - May change exemptions under ESA and WSIB
 - Board member personal liability
- Generally
 - Employment law is for the protection of workers
 - If it looks like a duck and quacks like a duck, it's a duck, even if you call it a goose.

When to Get Help...

- If you aren't sure of status or obligations (ounce of prevention)
- If you need assistance understanding a contract;
- In the event of an injury or accident;
- In the event that a worker asks for accommodation of some kind (ex. in the event of pregnancy, disability, religious holidays, etc.);
- In the event that the worker asks you about or makes demands related to their work and you aren't sure how to respond (leaves of absence, vacation, public holiday pay etc.);
- In the event that you would like to terminate the relationship with the worker (another ounce of prevention)
- Your worker files a complaint or indicates they are considering doing so;
- In the event that you are contacted by a government agency (HRSDC, Revenue Canada, Human Rights Tribunal, Ministry of Labour, WSIB, etc.).

What is the Government's Role?

1. Individualized Funding
2. Insufficient to meet legal obligations
3. Increased risk of crisis
4. Pressure from families can effect changes
5. \$24.3 million in 2017/18 to support families and agencies in DS Sector

Resources – Government of Canada

- [Employee or Self-Employed Guide](#)
- [Determining the Employee/Employer Relationship](#)
- [Recruiting and Hiring Workers in Canada](#)
- [T-4 Information for Employers](#)
- [T-4A Information for Payers \(including of self-employed commissions\)](#)
- [Issuing a Record of Employment on Termination or Interruption of Earnings](#)
- [Payroll Deductions Online Calculator Tool](#)

Resources – Ministry of Labour ESA Compliance

- [Fact Sheet – Difference between an Employee and an Independent Contractor](#)
- [ESA Poster](#)
- [What Businesses Need to Know](#)
- [ESA Online Compliance Tools](#)
- [Online Mandatory Training](#)
- [Domestic Workers](#)
- [Special Rules for Residential Care Workers \(Live-in\)](#)

inclusive results

25

Resources – WSIB

- [Protecting Domestic Workers](#)
- [Domestic Worker Policy](#)
- [Domestic Services Policy](#)
- [Independent Operators](#)

inclusive results

26

Resources – PooranLaw

Free Resources for Families and Service Providers in the DS Sector From PooranLaw

- **PooranLaw Webinar Series and Newsletter**
 - Visit www.pooranlaw.com to see all upcoming webinars, registration link included
- **PooranLaw ESA Compliance Tool**
 - Released today our ESA Compliance Tool for the DS Sector
 - Will help you determine what your obligations
 - [PooranLaw ESA Compliance Tool](#)
- **Inspiring Possibilities Planning Guide**
 - Free E-book by PooranLaw in collaboration with CLO
 - <http://planinspiringpossibilities.com/>

inclusive results

QUESTIONS



DISCLAIMER

The information provided in this presentation is not legal advice and does not create a solicitor-client relationship. PooranLaw Professional Corporation provides such information for general information purposes only. While we attempt to convey current and accurate information, we make no representations or warranties of any kind, express or implied, about the completeness, currency, accuracy, reliability, suitability or availability of the information. Any reliance you place on such information is therefore strictly at your own risk.